United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7426

In the

United States Court of Appeals

For the Second Circuit

Docket No. 75-7426

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IRVING STOLBERG,
Plaintiff-Appellant,

—v.—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT,
Defendants-Appellees and Respondents-Appellees.

ON APPPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING AND SUGGESTION OF IN BANC REHEARING

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Plaintiff-appellant petitions under Rule 40 of the Federal Rules of Appellate Procedure for rehearing of this Court's decision of June 2, 1976, affirming the District Court's denial of plaintiff's motion for a contempt judgment. Rehearing is sought on the grounds that the majority of the panel which ruled upon the appeal overlooked and misapprehended points of fact and law in vital respects. The majority concluded from a fragment of colloquy between the District Court and counsel at the end of the trial that plaintiff had somehow agreed to allow a defense available to defendants to be saved for another day; in effect, the majority rewrote the underlying judgment depriving plain-

tiff of rights under the judgment on which he had already acted. An examination of the context and surrounding facts that the majority overlooked or misapprehended shows that their conclusion is not supported and that it would destroy settled rules as to the finality of judgments.

Petitioner-appellant suggests, pursuant to Rule 35(b), that rehearing should be in banc in view of the radical departure from prior decisions of this Court, and of the Supreme Court, which this two-to-one decision represents. Consideration by the full Court is necessary to secure and maintain uniformity of its decisions, and the proceeding involves a question of far-reaching importance affecting the reliance that counsel may place upon well-established rules of practice in a class of cases of large and increasing significance. The exceptional nature of the majority's decision and of the effects of that decision is indicated by the language of Judge Mansfield's dissent, referring to the majority's conclusion as "bizarre" (slip opin., 3985), referring to the result of the majority's decision as "to say the least, extraordinary" (slip opin., 3985), and pointing out that "it is not easy to ignore the dire legal and social consequences" toward which the thrust of the majority's decision tends (slip opin., 3994).

I.

The Court overlooked or misapprehended points of fact and law as to the status of the dual job ban issue as a defense.

The majority opinion refers to the final comments of the District Court and counsel at trial and concludes that they were the equivalent of an explicit provision in the District Court's judgment allowing the dual job ban issue to be raised later. (Slip opin., 3980-81.) The full colloquy shows that this conclusion cannot be supported in the light of points overlooked or misapprehended:

> [166] . . .
>
> Mr. Giber: Defense rests.
>
> The Court: What do you gentlemen want to do now in connection with the submission of the case to the Court?
>
> Do you want to file briefs setting forth what your claims are?
>
> I don't know that there is very much dispute about the facts. You've furnished me with a transcript of all the testimony up to this point, except for today's, I guess; is that correct?
>
> Mr. Giber: That's correct, your Honor.
>
> The Court: Something was said at the outset by Mr. Winer about submitting proposed findings of fact and conclusions of law.
>
> In view of the defendant's action in resting without introducing any other evidence, I wonder if the facts are greatly in dispute, the principal [167] facts?

Mr. Giber: I don't think we have any dispute as to the principal facts, your Honor . We've allowed anything that came from the state files to go in. We have nothing to hide in this matter.

The Court: Yes.

* * *

[168] . . .

The Court: Yes.

Well, does the defendant take the position that it is willing to offer tenure to—

Mr. Giber: Yes sir, we will give him tenure immediately.

The Court: The reason I ask is one aspect of the relief sought for is injunctive relief.

So if that is so, then the only remaining issue in the case is one of damages, isn't it?

Mr. Winer: Yes.

If your Honor please, we would like to submit an affidavit as to attorney's fees. I believe the evidence in this record and the law as it stands now will support our claim. The only way we can prove that is by affidavit.

The Court: Such an affidavit may be filed, yes.

Mr. Winer: Could we set a date for the filing of— I said this at the very outset of the case, that it's a little unusual because the testimony has to be tied in to all this documentary evidence.

[169] The Court: Well, there isn't any need to tie in so much testimony now if the defendants takes the position that it is willing to grant tenure, is that correct?

Mr. Giber: It is willing to grant tenure. He has never been denied tenure, might be one way to state it.

Mr. Winer: That's an astonishing statement.

Mr. Giber: That was one of his grounds for relief.

No, I guess we are willing to grant tenure immediately. The board will meet and he will be granted tenure.

The Court: All right.

Mr. Winer: If your Honor please, there is a question as to what period of time he can come back. The earliest he can possibly come back is next fall and that, of course, causes him great—

The Court: All right. But I mean the point is we are now talking about any damages he may have sustained.

As far as relief goes, in order to grant tenure, it has to be considered in light of the fact that there is a statement in open Court that tenure will be granted at any time. That has to do with [170] whether or not the Court should exercise the power by imposing an order to that effect.

I suppose it also has a little significance possibly as an admission that the denial or refusal or hesitancy or delay in granting tenure at any early time was not proper.

But it seems to me then the only question which remains is that of damages.

I think see no reason why the submission which you propose to offer the Court to assist the Court in the way of a finding of facts and conclusions should not be limited accordingly. [Transcript of Trial Proceedings, December 21, 1971, R. Doc. No. 8, 166-70.]

There followed colloquy as to further documents to be submitted by stipulation, as to the time and manner of sub-

mitting briefs, and as to the pleadings. (R. Doc. No. 8, 170-73.) This included further specific reference to equitable relief by way of granting tenure.

At that point, by way of making certain that the court was fully advised that a potential defense had not been pleaded and raised by defendants and by way of avoiding any future claim by defendants that this might have occurred through inadvertence, particularly in the light of the preceding comments by the court that there was a statement in open court by defendants that tenure would be granted to plaintiff and that consequently briefs should be limited to the question of damages, plaintiff's attorney made the following statement (and the subsequent colloquy at the very close of trial is also given):

> . . .
>
> I call the Court's attention and Mr. Giber's attention to the fact that the defendant hasn't filed a defense about the question of office holding while on the faculty. That was to be filed, but has never been filed.
>
> The Court: What?
>
> Mr. Winer: There was to have been a defense filed by the defendant having to do with the plaintiff's position in the legislature and that was never filed.
>
> The Court: So it's not in the case. A dual job ban might affect the right to tenure?
>
> Mr. Winer: It might affect his right to return. Well, I withdraw the comment.
>
> The Court: All right. Adjourn Court. [R. Doc. No. 8, 173.]

The comment withdrawn was that, "It might affect his right to return." That is, plaintiff did *not* concede that

the issue might affect his right to return. The defense had not been pleaded by defendants; defendants had offered reinstatement in open court; the court instructed that the briefs be limited to the issue of damages; on explicit reference to the potential defense, defendants remained silent, and the court made it plain that the issue was not to be considered. Under such circumstances and upon well-established principles, defendants could not subsequently raise the issue in that case against a reinstatement order. In such circumstances it would have been impertinent to insist that the issue be briefed or that the court give consideration to the issue so removed from the case by defendants.

The underlying judgment did not explicitly limit its effect as to issues that might have been raised. We submit that the majority, in resting its opinion on the brief exchange quoted in the opinion, overlooked or misapprehended the context and import of the full colloquy quoted above within which it appears that neither the withdrawn comment nor the court's instruction to eliminate the issue from the briefs supports a conclusion that the underlying judgment can be rewritten as if the issue had been explicitly eliminated from the judgment. To rewrite the judgment in the guise of clarification or interpretation, and thereby undermine the substantial rights here involved, upsets settled rules of finality.

II.

The majority opinion is a radical departure from prior decisions of this Court and would have serious adverse effects upon an important class of litigation.

As stated in the dissent, "If ever a case was governed by the doctrine of *res judicata,* this is it." (Slip opin., 3985.) That opinion shows the degree to which the majority departs from established principles and violates "the very purpose of the doctrine of *res judicata,* which was designed to discourage just such belated piecemeal assertion of defenses that *might* properly have been raised during trial . . . " and, in doing so, reaches a "bizarre conclusion" with an "extraordinary" result. (Slip opin., 3985.)

The majority opinion breathes new life into the spirit of trial by attrition and trial by ambush, supposed to have been laid to rest with the adoption of the Federal Rules of Civil Procedure in 1938. Where, as here, a combination of equitable relief and monetary damages is sought and adjudged, the effect of the majority opinion is to cast doubt on the established rule that the judgment precludes further claims or defenses which might have been raised but were not. The consequence of this, as noted by Judge Mansfield (slip opin., 3990), would be to place upon plaintiffs the burden of seeing that a defendant's defenses are pleaded and litigated, and a correlative burden on defendants. Not only does this reverse the roles long relied upon by counsel under established rules of practice, it gives rise to unforeseen and virtually unforeseeable dangers attendant upon the narrowing of issues in litigation, usually thought to be a desirable goal.

As an example, Title VII litigation in the employment field constitutes a large and growing area in which combined monetary and equitable relief by way of back pay, attorneys' fees, reinstatement, promotion, hiring, or rearrangement of lines of advancement, will frequently be sought. The principles toward which the majority opinion leads as precedent, and on which it rests, will greatly magnify the cumbersomeness and dangers attendant upon such litigation. Prudence would then require parties to search out and insist upon opponents' claims and defenses.

The majority opinion so far departs from precedent established in this Court and in the Supreme Court as to *res judicata* and the effect that is to be given a court's valid equitable order, in a large and increasing field of important litigation, that a rehearing in banc should be ordered under Rule 35. Cases from which the opinion departs are: *Class* v. *Norton,* 505 F.2d 123, 125 (2d Cir. 1974); *Boruski* v. *United States,* 493 F.2d 301, 304 (2d Cir.), *appeal dismissed,* 419 U.S. 809, 42 L.Ed.2d 34, 95 S.Ct. 20 (1974); *NLRB* v. *Teamsters Local 282,* 428 F.2d 994, 999 (2d Cir. 1970); *Hopp Press, Inc.* v. *Joseph Freeman & Co.,* 323 F.2d 636, 637 (2d Cir. 1963); *John B. Stetson Co.* v. *Stephen L. Stetson Co.,* 128 F.2d 981, 983 (2d Cir. 1942), *cert. denied,* 299 U.S. 605, 81 L.Ed. 446, 57 S.Ct 232; *Alemite Mfg. Corp.* v. *Staff,* 42 F.2d 832, 833 (2d Cir. 1930); *Irving National Bank* v. *Law,* 10 F.2d 721, 724 (2d Cir. 1926); *Brougham* v. *Oceanic Steam Navigation Co.,* 205 Fed. 857, 860 (2d Cir. 1913); *Brown* v. *Bridgeport Rolling Mills Co.,* 245 F.Supp. 41, 44 (D. Conn. 1965); *FTC* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 212, 97 L.Ed. 245, 252, 73 S.Ct. 245 (1952); *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 192, 93 L.Ed. 599,

605, 69 S.Ct. 497 (1949); *Commissioner* v. *Sunnen,* 333 U.S. 591, 597, 92 L.Ed. 898, 905-906, 68 S.Ct. 715 (1948); *Maggio* v. *Zeitz,* 333 U.S. 56, 68-69, 92 L.Ed. 476, 487, 68 S.Ct. 401 (1948); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 378, 84 L.Ed. 329, 334-35, 60 S.Ct. 317 (1940); *United States* v. *Swift & Co.,* 286 U.S. 106, 119, 76 L.Ed. 999, 1008, 52 S.Ct. 460 (1932); *Cromwell* v. *County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195, 197 (1877).

CONCLUSION

For the foregoing reasons this Honorable Court should grant rehearing in banc.

Respectfully submitted,

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Certificate of Counsel

I, Louis M. Winer, a member of the firm of Tyler, Cooper, Grant, Bowerman & Keefe, attorneys for petitioner-appellant herein, do hereby certify that the foregoing petition is filed and presented in good faith and not for purposes of delay.

Louis M. Winer

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 15 day of June 19 76, at 3 o'clock P.M. he served the annexed Petition for Rehearing and Suggestion of in Banc Rehearing in Re: No. 75-7426 Irving Stolberg v. Members of the Board of Trustees for the State College of the State of Connecticut upon

1. Carl R. Ajello
2. Bernard F. McGovern, Jr. Esq(s)., Attorney(s)

for Defendants-Appellees and Respondents-Appellees

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

1. Attorney General
   30 Trinity Street
   Hartford, Connecticut 06115
2. Assistant Attorney General
   30 Trinity Street
   Hartford, Connecticut 06115

that being the address designated in the last papers served herein by the said attorney. Joseph Boselli

Sworn to before me this 15th day of June 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978